NOS. 22169 and 22169-A

United States
COURT OF APPEALS
for the Ninth Circuit

No. 22169

LANE-COOS-CURRY-DOUGLAS COUNTIES BUILDING AND CONSTRUCTION TRADES COUNCIL, AFL-CIO,

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

No. 22169-A

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

v.

JENS HORSTRUP,

Respondent.

Case No. 22169 on Petition for Review of An Order of the National Labor Relations Board

Case No. 22169-A on Petition for Enforcement of an Order of the National Labor Relations Board

PETITIONER'S REPLY BRIEF IN CASE NO. 22169

PAUL T. BAILEY
STEPHEN M. MALM
BAILEY, SWINK AND HAAS
617 Corbett Building
Portland, Oregon 97204
Attorneys for Petitioner

STEVENS-NESS LAW PUB. CO., PORTLAND, ORE. 2-68

INDEX

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES (Cont.)

NOS. 22169 and 22169-A

United States
COURT OF APPEALS
for the Ninth Circuit

No. 22169

LANE-COOS-CURRY-DOUGLAS COUNTIES BUILDING AND CONSTRUCTION TRADES COUNCIL, AFL-CIO,

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

No. 22169-A

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

v.

JENS HORSTRUP,

Respondent.

Case No. 22169 on Petition for Review of An Order of the National Labor Relations Board

Case No. 22169-A on Petition for Enforcement of an Order of the National Labor Relations Board

PETITIONER'S REPLY BRIEF IN CASE NO. 22169

REPLY TO THE NATIONAL LABOR RELATIONS BOARD'S COUNTERSTATEMENT OF THE CASE

The National Labor Relations Board's (hereinafter "Board") counterstatement of the case infers

that the Oregon State Building and Construction Trades Council Articles of Agreement (G.C. Ex. 18)[1] somehow govern the relationship between R. A. Chambers & Associates (hereinafter "Chambers") and its own employees. A reading of the plain language of the Articles of Agreement establishes beyond question that nothing could be further from the actual fact as to its tenor or intent.

Contrary to the Board's inference, the Articles of Agreement are designed exclusively to deal with problems relating to the contracting and subcontracting of work by an employer. They involve only the relationship of one employer with another and do not in any way attempt to govern or regulate matters affecting an employer's relationship with his own employees. The petitioner, Lane-Coos-Curry-Douglas Counties Building and Construction Trades Council (hereinafter "Council") has no interest in or intent of being recognized as the bargaining representative of any employer's employees or altering a particular employer's relationship with his own employees. (See Op. Br. pp. 13-14, 16-17 for extended discussion.)

Furthermore, the Articles of Agreement (G.C. Ex. 18) do not overlap or contradict the terms of local craft union agreements (see G.C. Exs. 12-15) in any manner which could conceivably lead to the conclusion that picketing by the Council to obtain the

---

[1] Tr. refers to Reporter's Transcript. Cr. refers to Clerk's record of pleadings. Op. Br. refers to the opening brief of the petitioner, Lane-Coos-Curry-Douglas Counties Building Trades Council. Ans. Br. refers to answering brief of the National Labor Relations Board.

Agreement has as an object recognition or representation of Chambers' own employees. This matter is discussed more fully in the Council's argument, infra pp. 3-9, and in the Council's opening brief, (Op. Br. pp. 18-21). The Board's extensive discussion (Ans. Br. 5) of supposed inconsistencies between the Articles of Agreement and local craft union agreements does not support its case.

Finally, the record unequivocally fails to supply a basis for the Board's statement (Ans. Br. 4) that all of Chambers' employees were local union members when Chambers executed agreements with various local craft unions. No objective evidence had ever come to Chambers' attention indicating with certainty that his employees were or were not union members. At best, he was only guessing as to their status. (Tr. 130-131). No other witness provided any further or more concrete evidence concerning the matter.

ARGUMENT

I

The Council's picketing was not for the purpose of recognition or bargaining.

Initially, the Board's brief does not deny the Council's proposition that it and other building trades councils throughout the nation, both historically and in the current situation, are concerned solely with the relationships between various employers in the industry as regards the contracting and subcontracting of work (See Op. Br. pp. 11-14). The Council is not

formed or operated for the purpose of seeking recognition as the bargaining agent or representative of employees in the building and construction industry. Likewise, the provisions of the Articles of Agreement (G.C. Ex. 18), which the Council sought to have Chambers execute, neither create nor infer any purpose on the part of the Council that Chambers should bargain with it as the representative of its employees.

The Board's error in asserting otherwise results from its failure to recognize the distinction between contract provisions limiting the actual right of an employer to subcontract work (e.g. union-standards subcontracting clauses such as those found in local craft union agreements (G.C. Ex. 12-15), and contract provisions which merely limit the persons or business entities to whom the employer may subcontract work (e.g. union-signatory subcontracting clauses such as that found in Para. IV of the Articles of Agreement, G.C. Ex. 18). The former contract provisions are primary and designed to establish terms and conditions of employment in the principal employer's work unit, while the latter are secondary and affect only the principal employer's relationship with other employers through limitations on the subcontracting of work. See *Truck Drivers Local* 413 v. *NLRB*, 334 F.2d 182 (D.C. Cir. 1964) and *Orange Belt District Council of Painters, No.* 48 v. *NLRB*, 328 F.2d 534 (D.C. Cir. 1964) for a detailed discussion of this distinction.

The subcontracting clause in the Articles of

Agreement (Para. IV, G.C. Ex. 18) is of the latter, secondary type, not defining a collective bargaining unit or attempting in any way to determine the terms and conditions of employment under which Chambers' own employees might work. Its only purpose is to regulate Chambers' relationship with other employers in the building and construction industry, a purpose totally distinct and independent from that of the local craft unions which attempt to preserve terms and conditions of employment among Chambers' own employees by including primary, union-standard subcontracting clauses in the local craft union agreements such as G.C. Exs. 12-15. Therefore, since the subcontracting clause of the Articles of Agreement does not in any sense influence Chambers' relations with his own employees, or intrude on Chambers' bargaining relationship with local unions, picketing by the Council to obtain Chambers' execution of the Agreement neither expressly nor inferentially created a purpose on the part of Council to be recognized as the bargaining representative of those employees.

The Board has expressly recognized the validity of the distinction drawn here by its decision in *Blinne Construction Co.*,[2] 135 NLRB No. 121, 49 LRRM 1638 (1962) (f.n. 29), a case involving picketing un-

---

[2] In *Blinne,* the board discussed at length both the theory and application of Sec. 8(b)(7). Its language and analysis are, contrary to the Board's position (Ans. Br. 17, f.n. 6), highly relevant to this case. It is accurately and appropriately cited by Council, both here and in its opening brief, as authority for the proposition it supports.

der Sec. 8(b)(7) of the Labor-Management Relations Act, as amended (29 U.S.C. Sec. 158(b)(7)) (hereinafter the "Act"), where it stated:

> ". . . we deal here not with abstract economic ideology. Congress itself has drawn a sharp distinction between recognition and organizational picketing and other forms of picketing, thereby recognizing as we recognize, that a real distinction does exist."

The fact that the Council has attempted to obtain Chambers' execution of the Articles of Agreement does not establish a purpose on the Council's part to be recognized as the agent of Chambers' employees. A labor organization such as the Council may clearly deal with employers concerning the subcontracting of work as well as other matters outside the traditional scope and nature of matters involving wages, hours and working conditions and not be subject to the proscriptions of Sec. 8(b)(7). *IBEW, Local* 903, 154 NLRB No. 10, 1965 CCH NLRB 9600.[3]

Using the precise language of the National Labor Relations Act, the Council, "dealing with" Chambers

---

[3] This case and *Bldg. and Const. Trades Council,* 141 NLRB No. 2, 52 LRRM 1269 (1963), unlike the Board's suggestion (Ans. Br. 16-17, f.n. 5, 6), are not distinguishable on their facts from the instant case. Picketing in those cases was carried out to prevent the use of non-union signatory subcontractors by a general contractor. Picketing in the present case was for the purpose of obtaining an agreement to prevent the use of non-union signatory subcontractors. In neither those cases nor the instant case did the trades council involved have any intent of representing the general contractor's employees. If there is a distinction, it is one without a difference.

over matters relating to the subcontracting of work, was not engaging in the much more limited field of "bargaing" as the representative of Chambers' employees. See *NLRB* v. *Cabot Carbon Co.*, 360 U.S. 203, 79 S. Ct. 1015 (1959).

Secondly, the Board's contention that Paragraph IX of the Articles of Agreement (G.C. Ex. 18) is somehow inconsistent with the no-strike and picketing provisions of the local craft union agreements (Ans. Br. 5, 11) has no support in the language of those agreements. Paragraph IX of the Articles of Agreement establishes various circumstances under which it will not be a violation of the Agreement for an employee to refuse to perform work or cross a picket line. But the Articles of Agreement nowhere list or preclude the possibility that such a refusal might be in violation of the terms and conditions of a local craft union agreement. The Articles of Agreement in no way hinder the freedom of individual employers and local craft unions to agree on no-strike commitments or commitments to furnish workers as they might see fit. No inference that the Council seeks recognition is created by Paragraph IX of the Articles of Agreement.

Because the Articles of Agreement have no recognition or organization object, the fact that they can be amended only with approval of the Council (see Paragraph X) does not impede bargaining or the bargaining relationship between Chambers and the local unions representing his employees. This provi-

sion (Paragraph X) fails to support the Board's contention that an object of recognition exists.

Sec. 8(b)(7) of the Act (29 U.S.C. Sec. 158(b)(7)) proscribes picketing only where an object thereof is recognition by the picketing labor organization as the representative of an employer's employees, *NLRB* v. *Local* 3, *IBEW*, 362 F.2d 232 (2d Cir. 1966). Neither the inherent nature of the Council, the terms of the Articles of Agreement which it was seeking to have Chambers execute, nor any evidence in the record of this case supports the proposition that any such object of recognition exists here. Any shadow of prima facie evidence (Ans. Br. 9), which the Council's demand for execution of the Articles of Agreement may have created, is clearly overcome by the evidence before this Court and the plain language of the Agreement itself.

The case of *Centralia Building and Construction Trades Council* v. *NLRB*, 363 F.2d 699 (D.C. Cir. 1966) is cited by the Board in support of its position (Ans. Br. 9-10). Quite to the contrary, the reasoning of the Board in the *Centralia* decision adds merit to the Council's position. In that case, the buidling trades council picketed to obtain the employer's execution of an agreement requiring payment of certain wages and fringe benefits to his own employees. This is precisely the situation that Sec. 8(b)(7) was designed to regulate. The Council and the Articles of Agreement in the instant case have no such purpose. The only effect of the Articles of Agreement here is

to regulate matters concerning Chambers and other employers in the industry. The *Centralia* case points up and supports the very distinction that the Council is asserting.

Picketing by the Council was entirely consistent with the policy of preserving to employees freedom of choice in the selection or rejection of bargaining representatives, which is the basis for the enactment of Sec. 8(b)(7). The historically recognized role of building and construction trades councils as a coordinator of activities in the construction industry (see Op. Br. 11-14) strengthens, rather than subverts, the stability and tranquility in labor relations which Sec. 8(b)(7) was designed to achieve.

II

The Council's picketing was conducted at a time when Chambers had not lawfully recognized any other union, and a question concerning representation could appropriately be raised under Sec. 9(c) of the Act.

In National Labor Relations Board proceedings, an employer charging that Sec. 8(b)(7)(A) has been violated must establish that he has lawfully recognized another labor organization as the bargaining representative of his employees, *NLRB* v. *Local* 3, *IBEW*, 362 F.2d 232 (2d Cir. 1966). The Board would now suggest (Ans. Br. 18-19) that because six months has passed since Chambers executed agreements with various local craft unions, Chambers is suddenly excused from carrying this statutory bur-

den of proof. While the six months statute may certainly apply for the limited purpose of precluding the Council from questioning the majority status of the local unions as regards the illegality of an employer's activity, the Board decisions on this question[4] have never held that this relieves the employer of the duty of displaying evidence that he has lawfully recognized another labor organization. If Congress had intended that the burden of proving lawful recognition in Sec. 8(b)(7)(A) proceedings be set aside in cases similar to the one now before the Court, it would have expressly placed such an exception in the language of the Labor-Management Relations Act.

This is precisely the thrust of the Council's argument. If one assumes for the moment, without admitting, that the Council, under the 1956 Building Trades Agreement (Resp. Ex. 4) executed with Chambers, was the bargaining representative of Chambers' employees, then not only has the Board failed to prove that Chambers lawfully recognized the local craft unions, but the record establishes quite clearly that only the Council was the lawful representative. Its labor agreement with Chambers did not terminate until after Chambers had executed the local craft agreements (See Op. Br. 24-25).

On the other hand, it is perfectly acceptable for the Council to raise the fact the record fails to establish that a majority of Chambers' employees were un-

[4] See particularly Local 7463, UMW, 160 NLRB No. 129, 63 LRRM 1173 (1966) and International Hod Carriers, Local 1298, 153 NLRB No. 58, 1965 CCH NLRB 9506.

ion members at the time agreements were executed with the local crafts, when the Council's only purpose in doing so is to show that those contracts were simply pre-hire agreements made lawful only by Sec. 8(f) of the Act. See *Alton-Wood River Bldg. Trades Council*, 144 NLRB No. 31, 54 LRRM 1040 (1963). The majority status of Chambers' employees as union members had not been established at the time agreements were executed with the local crafts (supra p. 3 and Op. Br. 37-38). Therefore, those contracts were pre-hire agreements which, under Sec. 8(f), are not a bar to the raising of a question concerning representation under Sec. 9(c) of the Act, *McLeod* v. *Electrical Workers (IBEW) Local* 3, — F. Supp. —, 57 LRRM 2052 (S.D.N.Y. 1964); *Island Construction Co.*, 135 NLRB No. 1, 1962 CCH NLRB 10,820. Because a question concerning recognition could be raised at the time the Council was engaged in picketing at Chambers' construction site, the picketing did not and could not violate Sec. 8(b)(7)(A), *General Truck Drivers, Warehousemen & Helpers, Locals* 980 & 624, 158 NLRB No. 103, 62 LRRM 1153 (1966).

For the purpose of determining whether a question concerning representation could be raised under Sec. 9(c) of the Act, mere execution of local craft union agreements by Chambers did not raise a rebuttable presumption at all as to the union-member majority status of its employees. The presumption asserted by the Board (Ans. Br. 21-22) arises only where the legality of an employer's recognition of a

union is placed in issue. Those cases[5] relied upon by the Board (Ans. Br. 21) concern only the "lawful recognition" portion of Sec. 8(b)(7)(A) and expressly state that the sole basis for the presumption is that a party attacking the legality of an employer's recognition of a union should be required to establish that illegality.

On the other hand, the Council here raises the question of majority status, not to refute the legality of Chambers' craft union agreements, but only to show that legal or not, the local agreements were executed solely under authority of Sec. 8(f) and do not prevent the raising of a question concerning representation. Under the circumstances of the present case, the basis and reason for the presumption do not exist. In *Alton-Wood River Bldg. Trades Council,* 144 NLRB No. 31, 54 LRRM 1040 (1963), the Board was concerned as the Court is here only with the matter of whether a question concerning representation could be raised under Sec. 9(c) of the Act. No such presumption was raised.

---

[5] *NLRB* v. *Local 3, IBEW,* 362 F.2d 232 (2d Cir. 1966) and *Shamrock Dairy, Inc.,* 119 NLRB No. 134, 41 LRRM 1216 (1957).

CONCLUSION

For these reasons, and those set forth in Council's Opening Brief, it is respectfully submitted that the Court find the Council's activity was not in violation of Sec. 8(b)(7)(A) of the Act and that the decision of the National Labor Relations Board be reversed.

BAILEY, SWINK & HAAS
PAUL T. BAILEY
STEPHEN M. MALM
Of Attorneys for the Petitioner
617 Corbett Building
Portland, Oregon 97204

CERTIFICATE OF COUNSEL

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

PAUL T. BAILEY
Of Attorneys for the Petitioner